(The Financial News Corporation, Jacksonville, Florida—9—58)

FILE COPY

MOTION FILED APR 21 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 261

AMERICAN NATIONAL BANK OF JACKSONVILLE,

Petitioner,

against

UNITED STATES OF AMERICA, AND
TITLE & TRUST COMPANY OF FLORIDA

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

AND

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

MOTION

Petitioner respectfully moves for leave to file, out of time, the annexed petition for rehearing of the order of this Court (3 L. Ed. 2d, 72) entered October 13, 1958. This motion and the annexed petition are based on the following grounds:

1. Subsequent to the denial of the petition for certiorari herein, this Court has decided to review *Aquilino v. United*

States, case No. 132 of this term, a case involving a point related to and which could have been determinative of this cause, namely, unconstitutional procedure of the lower court within the meaning of *Erie R. Co. v. Tompkins*, 304 U. S. 64, in determining priorities as a matter of property right in a dispute involving a Tax Lien of the United States.

2. Also subsequent to the denial of certiorari herein, this Court has granted certiorari on February 24, 1959, in case No. 579, *United States v. Durham Lumber Co.*, a case likewise involving such point, where the Solicitor General had sought summary reversal of a decision applying State Law in similar circumstances.

3. Also subsequent to the denial of certiorari herein, this Court has, on January 26, 1959, in *Hermann v. Rogers* (No. 572) decided a case sufficiently like *Durham Lumber* and the case at bar to be considered in direct conflict with the results there reached. If State law was properly applicable to decide *Hermann v. Rogers, Durham Lumber* and the case at bar ought likewise to be decided by the application of State law. The Law Edition editors annotation thereto in 3 *Law Ed.* 2d, 345, 346, represents the universal thinking in attributing *Hermann v. Rogers* to *Erie R. Co. v. Tompkins* and the constitutional point decided by it.

4. Fairness requires reconsideration of the denial of certiorari herein, in order that this Petitioner may have whatever benefit might flow to it from the court's consideration of *Aquilino* and *Durham Lumber*.

JURISDICTION

The jurisdiction of this Court to entertain the petition for certiorari herein was not denied by the respondent's brief in opposition thereto. The term at which the petition was denied is still in session. This Court has consistently granted Motions of the character of this Motion, when the ends of justice so require. *United States v. Ohio Power Co.*, 351 U. S. 980; *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183.

PRAYER FOR RELIEF

Wherefore, petitioner prays that this Motion be granted and that the annexed petition for reahearing be granted and that, on such hearing, the petition for certiorari be granted and the judgment appealed from be reversed, and for such other and further relief as this Court may deem just and proper.

Dated: Jacksonville, Florida,

April 14th, 1959

Respectfully submitted,

W. GREGORY SMITH,
216 American National Bank Building,
Attorney for Petitioner,
Jacksonville 7, Florida

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 261

AMERICAN NATIONAL BANK OF JACKSONVILLE,

Petitioner,

against

UNITED STATES OF AMERICA, AND
TITLE & TRUST COMPANY OF FLORIDA,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of October 13, 1959, (3 L. Ed. 2d, 72) denying certiorari herein and prays that the Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this cause, as prayed for by the Petition for Certiorari filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time this Court's order denying certiorari was entered, this Court did not have before it and had not granted certiorari in *Aquilino v. United States*, No. 132, and *United States v. Durham Lumber Co.*, No. 579. Those cases, and this

case, present the constitutional question whether State law or Federal decisions determines property rights in cases involving Federal Tax Liens. Since this Court is going to review its decisions in this field, it is apropos that this case be decided in the light of that review.

2. At the time of the denial of certiorari herein, this Court had not determined *Hermann v. Rogers* (No 572), decided January 26, 1959, where this Court unanimously applied State property law to determine the rights of the United States to property, and the decision in the case at bar is in direct conflict therewith.

3. The Court's actions, without opinion, in this case (No. 261), in *Goldstein* (No 215), and in *Hulley* (No 300), seemed to indicate abandonment by this Court of the doctrine of determination of property rights according to State Law, announced in *Commissioner v. Stern*, 2 L. Ed. 2d 1126, and in *United States v. Bess*, 2 L. Ed. 2d 1135. If, now, reaffirmation of that doctrine is about to occur, as granting certiorari in *Aquilino* and *Durham Lumber* might indicate, and as the Court's action on January 26, 1959, in *Rogers v. Calumet National Bank of Hammond* (No. 468) and in *Hermann v. Rogers* (No. 572) might further indicate, then it would be unjust not to reconsider the denial of certiorari in the instant case, so that same might be governed by the rule about to be further considered. Fairness requires such. See *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183, 100 L. Ed. 1075, 76 S. Ct. 758.

4. It is clear on the record in this case that the Circuit Court of Appeals for the Fifth Circuit failed to apply the Florida Statute law, and otherwise erred, if Florida Law governs the controversy herein.

5. This Court's time will not be consumed materially in the consideration of this case, since it is to review *Aquilino* and *Durham Lumber*. Having this case before it will only slightly broaden the scope of the work involved in those cases. Fairness and justice would not be served by denying this Petitioner the benefit, if any, of such decision as this Court will make in those cases.

6. An analysis by Professor Ernest J. Brown of Harvard Law School, November, 1948, issue, 72 *Harvard Law Review*, 82-87, shows the surprising and puzzling state of law in this field, within the decisions of this very court, and the need for full exploration of the merits.

CONCLUSION

The petition for rehearing should be granted, the denial of certiorari vacated, and the petition for certiorari granted.

Respectfully submitted,

W. GREGORY SMITH,
Attorney for Petitioner,
216 American National Bank Building,
Jacksonville 7, Florida

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

W. GREGORY SMITH,
Attorney for Petitioner,
216 American National Bank Building,
Jacksonville 7, Florida.

CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this Motion For Leave to File Petition For Rehearing Out Of Time And Petition For Rehearing Of Order Denying Petition For Certiorari has been made on each of the following parties in the manner indicated:

On the:

Solicitor General,
Department of Justice,
Washington 25, D. C.;

by mailing same to him with air mail postage prepaid, addressed as bove.

On the United States Attorney for the Southern District of Florida, and on Ray W. Richardson, Jr., Attorney for Respondent, Title & Trust Company of Florida, by delivery at the office of counsel, to counsel or a Clerk therein

W. GREGORY SMITH,
Attorney for Petitioner.